Supreme Court, U.S.
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No. 96-____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DANIEL MOSES

Petitioner,

v.

CITY OF EVANSTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a public employee who is threatened with a thirty day unpaid suspension entitled, under the Due Process Clause, to the same procedural safeguards attendant to deprivation of a prisoner's good time, termination of welfare benefits, and revocation of parole?

2. When governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings,

   i. Must the evidence used to prove the government's case be disclosed to the individual so that he has an opportunity to show that it is untrue?

   ii. Must the agency which makes a binding determination that subjects a person to a grevious loss employ the procedures which have traditionally been associated with the judicial process, including confrontation and cross-examination of adverse witnesses, an opportunity to present witnesses and argument, and a written explanation of the decision?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Daniel Moses respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 20, 1996.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-7) and the opinion of the district court (App. 9-16) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 8) was entered on September 20, 1996; petitioner did not seek rehearing.

STATEMENT

In August of 1993, when petitioner held the rank of Commander in the police department of respondent Evanston, Illinois, respondent received a complaint from a 13 year old male that petitioner had used excessive force. Respondent investigated this complaint and obtained statements from the complainant, four witnesses, and petitioner.

On October 14, 1993, respondent informed the person who had complained about petitioner that his complaint had been sustained.

On November 9, 1993, after the complainant had been informed that his complaint had been sustained, respondent afforded petitioner a "pre-disciplinary meeting." Petitioner was permitted to bring counsel to the hearing, but was not

permitted to read any of the witness statements. As respondent's attorney stated at the hearing,

> This is not a hearing. This is a predisciplinary meeting at which point he has the opportunity to give his side of the story.

After the "pre-disciplinary meeting," respondent suspended petitioner for 30 days. Thereafter, petitioner was demoted from the rank of Commander. Respondent's rules did not provide petitioner with any post-suspension hearing and petitioner was never afforded an opportunity to confront and cross-examine adverse witnesses or to review their statements.

Petitioner then brought this action in the district court, contending that respondent's procedures had failed to provide him with the process that was due.

From discovery materials provided in this case, petitioner learned for the first time that on September 9, 1993, respondent's Acting Chief of Police had submitted a memorandum (that was considered in the discipline decision) that petitioner had admitted to having "body-slammed" a youth. Petitioner denied this allegation in an affidavit filed in the district court.

In his complaint in the district court, petitioner asserted that he had been entitled to know about the Acting Chief's claim that petitioner had admitted to "body slamming." Petitioner also contended that he had been entitled to review the witness statements and cross-examine his accuser and any adverse witnesses. In addition, petitioner complained that he had not received an adequate chance to tell his side of the story, because the decision to impose discipline had been made before the "pre-disciplinary meeting."

The district court found the procedures to be constitutionally adequate (App. 13-15) and the Seventh Circuit affirmed. The Court of Appeals concluded that petitioner had not been

entitled to review the witness statements or to confront and cross-examine his accusers. (App. 6.) The Seventh Circuit approved non-disclosure of the "body slamming" memorandum and the involvement in the disciplinary process of the Acting Chief of Police, the witness to the alleged the oral admission, concluding that petitioner had been afforded "a full opportunity to tell his own story at the Pre-Disciplinary Hearing." (*Id.*) The court of appeals did not advert to petitioner's argument that the decision to sustain the allegation had been made in advance of the "pre-disciplinary hearing," when the complainant had been notified that his allegation had been sustained. In the view of the court below, due process was satisfied "by written notice plus a hearing at which all questions can be aired." (*Id.*)

REASONS FOR GRANTING THE WRIT

The Court should exercise its supervisory powers to correct the unwarranted departure of the Seventh Circuit from the accepted and ordinary rule that a public employee facing a grevious loss is entitled to "an explanation of the evidence the authorities have," *Goss v. Lopez,* 419 U.S. 565, 581 (1975), confrontation and cross-examination of adverse witnesses, *Greene v. McElroy,* 360 U.S. 474, 496 (1959), an opportunity to present witnesses and argument, *Goldberg v. Kelly,* 397 U.S. 254, 269 (1970), and a written explanation of the decision. *Morrissey v. Brewer,* 408 U.S. 471, 489 (1972).

1. Depriving an employee of his income is a serious deprivation, *Brock v. Roadway Express,* 481 U.S. 252, 263 (1987). There is no dispute that a 30 day unpaid suspension of a public employee who can only be discharged for cause implicates the Due Process Clause of the Fourteenth Amendment. *Goss v. Lopez,* 419 U.S. 565, 573 (1975).

2. The rule adopted by the Seventh Circuit *Cholewin v. Evanston,* 899 F.2d 687 (7th Cir. 1990), and applied in this

case (App. 5), is that police officers who can only be discharged for cause are entitled to neither disclosure of the evidence against them nor to an opportunity to confront and cross-examine adverse witnesses. 899 F.2d at 690. In the view of the Seventh Circuit, due process does not require a "full trial-type hearing" (App. 5), but is satisfied by an informal meeting, at which the police officer can relate his side of the story. *Id.* In addition, the allegation of wrongdoing may be sustained before the informal meeting. The Seventh Circuit's rule flies in the face of prior decisions of this Court.

3. The Court has made plain that a person threatened with termination of welfare benefits must be provided with "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. *Goldberg v. Kelly*, 397 U.S. 254, 269-70 (1970). Similarly, the Court has held that the "minimum requirements of due process" for revocation of parole include

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers of lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

The Court has mandated less comprehensive procedures for a prisoner who facing placement into disciplinary segregation, *Wolff v. McDonnell*, 418 U.S. 539, 568 (1974), or for a prisoner who is being considered for parole. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12-17 (1979).

4. In the Seventh Circuit, police officers facing unpaid suspensions are afforded procedural protections comparable to those required when prison authorities seek to transfer a prisoner from "one extremely restricted environment to an even more confined situation." *Hewitt v. Helms,* 459 U.S. 460, 472 (1983). In the view of the Seventh Circuit, the process that is due before a police officer may be stigmatized by an finding of serious wrongdoing and suspended without pay for 30 days are less elaborate than those required by *Goss v. Lopez,* 419 U.S. 573 (1975) when a school child is to be suspended for ten days.

5. The Seventh Circuit is alone in holding that an informal meeting, held after a complaint of wrongdoing has been sustained, provides all the process which is due. *See, e.g., Garraghty v. Commonwealth,* 52 F.3d 1274, 1284 (4th Cir. 1995); *Winegar v. Des Moines Independent School District,* 20 F.3d 985, 901 (8th Cir. 1994); *Langley v. Adams County, Colorado,* 987 F.2d 1473, 1478 (10th Cir. 1993).

6. This Court has squarely held that "[c]onfrontation and cross-examination are essential . . . where a person may lose his job in society." *Wolff v. McDonnell,* 418 U.S. at 568, citing *Greene v. McElroy,* 360 U.S. 474, 496-97 (1959). The Seventh Circuit has adopted a contrary rule. The Court should correct this unwarranted aberration.

CONCLUSION

The petition for writ of certiorari should be granted.

December, 1996

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-3712

DANIEL MOSES

Plaintiff-Appellant,

v.

CITY OF EVANSTON,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 199 **Charles R. Norgle,** *Judge.*

ORDER

ARGUED June 11, 1996–DECIDED September 20, 1996

Before Cudahy, Kanne, and Diane P. Wood, Circuit Judges.

PER CURIAM:

Daniel Moses was a Commander in the Evanston, Illinois, police department. As a result of an incident in which he was accused of "body-slamming" a thirteen-year-old boy against a police car, the department suspended him for thirty days without pay. Moses then sued, claiming that the procedures the department used violated the Due Process Clause of the Fourteenth Amendment, because he was not given a full evidentiary hearing and because his decision makers were biased. The district court granted the City's motion for summary judgment, finding that the procedures were constitutionally adequate. We affirm.

The incident itself occurred when Moses and his partner, Lieutenant Gresham, were out on another matter. They

stopped at a store, where Moses wanted to buy some cigarettes. As the unmarked squad car pulled into a parking lot adjacent to the store, a small group of boys crossed in front of it. One of the boys threw something at the car. (The boy said it was just a leaf, but the dispute is immaterial for our purposes.) Moses, dressed in plainclothes, got out and approached the boy, asking him to approach the squad car. Moses claimed that he identified himself as a police officer, but the boy denied this. The boy then took a swing at Moses. Moses responded by seizing the boy by the arm with one hand and grabbing his throat with the other. He swung the boy around and threw him (or placed him, as Moses put it) onto the hood of the car. He then apologized to the boy and allowed him to leave. Moses did not report the incident, because he considered it minor and believed that it had been resolved at the scene.

The latter supposition proved to be untrue; the boy filed a complaint on August 16, 1993, with the Evanston Police department, asserting that Moses had used excessive force during the encounter. The investigation was under the supervision of Acting Police Chief Frank Kaminski, who assigned Sergeant Page to be the investigator. Page interviewed the boy and the other witness during August and September. On September 2, Moses received a "notice of investigation," which identified the accuser by name, furnished the date, time, and place of the occurrence, cited the relevant Police Department rules, summarized the complaint as follows:

> Complainant alleges that he was grabbed by the neck by you because you thought he threw something at the car you were a passenger in. He alleges that you then picked him up by the neck and lifted him into the air and slammed him onto the hood of a car. You also didn't make a police report regarding this incident.

A few days later, Kaminski placed a memorandum in the case file reporting that he had heard Moses boasting about having "body-slammed" a youth. Page interviewed Moses on September 23; Moses declined to have counsel present on that occasion.

Following the City's established disciplinary procedures for officers above the rank of captain, the Assistant City Manager, the Director of Personnel, a member of the Law Department and Acting Chief Kaminski held a "Due Cause" meeting on October 11, 1993. The purpose of the meeting was to consider the results of the internal investigation and to recommend the maximum amount of discipline that might be imposed. The result was a decision to go forward with the complaint and a recommendation of a 30-day suspension from the force. Moses, the complaining party, and the Evanston City Council were all informed of this decision.

The next step was a "Pre-Disciplinary Hearing," which was held on November 9. Page presided over the meeting, which also included Moses and his lawyer, Gresham, a member of the Evanston Law Department, Chief of Police Gerald Cooper, another police officer, and Kaminski. Moses was informed of the result of the "Due Cause" meeting and was allowed to tell his side of the story, both personally and through witnesses. At that time, however, he did not know about the memorandum to the file Kaminski had written, nor about its allegation of the "body-slamming" boast. Furthermore, the City refused Moses' request to furnish him copies of the witness statements it had collected, saying "[t]his is not a hearing. This is a pre-disciplinary meeting at which point he [Moses] has the opportunity to give his side of the story." Whatever it may have been called, at the conclusion of the "Pre-Disciplinary Hearing" Chief Cooper decided to suspend Moses for thirty days without pay.

Moses then sued for violations of his Fourteenth Amendment right to due process. The complaint purported to be

one directly under the Fourteenth Amendment, rather than through 42 U.S.C. § 1983. His "Civil Cover Sheet," however, cited the action as one under § 1983. We agree with the City that there is no cause of action directly under the Fourteenth Amendment when § 1983 is available. See *Baxter by Baxter v. Vigo County School Corp.* 26 F.3d 728, 732 n.3 (7th Cir. 1994); *Azul-Pacifico, Inc. v. City of Los Angeles,* 973 F.2d 704, 705 (9th Cir. 1992), *cert. denied,* 506 U.S. 1081 (1993); *Turpin v. Mailet,* 591 F.2d 426, 427 (2d Cir. 1979) (en banc) (per curiam), *cert. denied sub nom. Turpin v. City of West Haven,* 449 U.S. 1016 (1980). Neverthe less, like the district court we are willing to assume *arguendo* that Moses adequately raised the § 1983 theory and decide the case on that basis.

Our review of the district court's judgment is *de novo,* taking all the facts and inferences in the light most favorable to the non-moving party. *Smith v. Shawnee Library System,* 60 F.3d 317, 320 (7th Cir. 1995); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248-49 (1986). In this case, however, the key question is a legal one: did the undisputed procedures that the City followed satisfy due process requirements? In approaching the case this way, we give the benefit of the doubt to Moses on the question whether his position was sufficiently distinct from "employment at will" to give rise to a protected property interest, which is a prerequiste to a § 1983 case. See *Border v. City of Crystal Lake,* 75 F.3d 270, 273 (7th Cir. 1996); *Wallace v. Tilley,* 41 F.3d 296, 299 (7th Cir. 1994). We were told at oral argument that the City could reassign a Commander to a lower position at will, and that Evanston has a modified civil service system that protects officers below the rank of captain. We therefore assume for the sake of argument that a genuine issue of fact exists on the nature of the position, which would preclude summary judgment on this ground.

The fundamental requirements of due process are notice and an opportunity to be heard at a meaningful time and in a

meaningful manner. See *Cleveland Board of Education v. Laudermill,* 470 U.S. 532, 546 (1985); *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976); *Cholewin v. City of Evanston,* 899 F.2d 687, 689 (7th Cir. 1990). It is not always necessary to furnish a full trial-type hearing prior to the adverse administrative action. Instead, a more flexible approach is called for. In cases involving public employee dismissal proceedings, this court has stated that they are entitled to "oral or written notice of the charges against them, an explanation of the employer's evidence, and an opportunity to present their side of the story prior to their discharge." *McCammon v. Indiana Dept. of Financial Inst.,* 973 F.2d 1348, 1350 (7th Cir. 1992), *cert, denied,* 507 U.S. 920 (1993).

In this case, Moses received notice of the investigation on September 2, which informed him about the incident and the alleged conduct of his that violated the rules. He also had notice of the charges against him before the Pre-Disciplinary Hearing, through the interview Page conducted on September 23. At the hearing itself, he received an explanation of the City's evidence, and he indisputably had an opportunity to present his side of the story. The flaws in the procedure, as he sees it, were more subtle; he did not receive the requested copies of the witness statements in the City's possession, and Acting Chief Kaminski did not reveal the memorandum in which he recalled Moses boasting about "body-slamming" someone. The City agrees with this factual description and takes the position that Moses was not entitled to receive this information.

Moses' procedural rights were not violated in these circumstances. This is not a case like *Swank v. Smart,* 898 F.2d 1247 (7th Cir. 1990), in which the police officer had no opportunity to respond to a statement containing the police chief's assessment of the harm that had been caused by his conduct. The respondent officer has the right to know about additional charges or evidence pertinent to the remedy that might be imposed. Here, Moses knew the nature of the

charges. He knew that the dispute was whether or not he had used excessive force on the boy when he put him on the hood of the car. According to the boy and his witnesses, Moses knew, the answer was yes; Moses himself denied it, both in the interview and at the hearing. We see nothing wrong with the City's decision not to turn over the original statements themselves, as long as Moses was fully informed of their content.

Moses' complaint about Kaminski's memorandum is more troubling, but in the end we conclude that any error that might have been made in refusing to disclose its existence and the substance of the comment was harmless. Moses certainly knew that Kaminski was aware of the charges against him: Kaminski was supervising the investigation. The term "body-slamming" may be colorful, but it is only a way of describing the action of which Moses was accused, and Moses already knew that he was accused of "slamming" the boy onto the hood of the car. Moses may not have recalled making the boast that Kaminski attributed to him, but he had a full opportunity to tell his own story at the Pre-Disciplinary Hearing. Given the array of witnesses against him, his credibility was already a central issue for the decisionmaker. It would have been preferable for the City to come forward with something as significant as an admission, which Moses' alleged statement to Kaminski appeared to be. Nevertheless, if due process is satisfied by written notice plus a hearing at which all questions can be aired. See also *Smith v. Town of Eaton,* 910 F.2d 1469, 1472 (7th Cir. 1990), *cert. denied,* 499 U.S. 962 (1991).

Moses also claims that his hearing was defective because it was conducted by a biased decisionmaker, namely, Kaminski. In fact, however, the hearing was conducted by Page, in the presence of the ultimate decisionmaker, Chief Cooper. There is no indication that either of them were biased, nor is there any indication that Cooper was merely a cat's paw for Kaminski. Moreover, the fact the one of the decisionmakers

was involved with the investigatory process does not, in itself, call the fairness of the hearing into question. See, *e.g.*, *Withrow v. Larkin*, 421 U.S. 35, 53-54 (1975); *Bakalis v. Golembeski*, 35 F.3d 318, 326 (7th Cir. 1994); *Panozzo v. Rhoads*, 905 F.2d 135, 140 (7th Cir. 1990).

Last, Moses points out that officers at or below the rank of captain receive greater procedural protections from the City than those above that rank, as he was. The question, however, is whether the process used in his case was constitutionally adequate. If so, it makes no difference whether the City chose to give more elaborate procedural protections to others as a matter of local law. See *Panozzo v. Rhoads*, 905 F.2d 135, 140 (7th Cir. 1990); *Stern v. Tarrant County Hosp. Dis.*, 778 F.2d 1052, 1059 (5th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1108 (1986). In this case, the City's procedures did not violate the Fourteenth Amendment. We therefore AFFIRM the judgment of the district court.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-3712

DANIEL MOSES

Plaintiff-Appellant,

v.

CITY OF EVANSTON,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 199 **Charles R. Norgle,** *Judge.*

[September 20, 1996]

JUDGMENT — WITH ORAL ARGUMENT

Honorable Richard D. Cudahy, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge
Honorable Diane P. Wood, Circuit Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DANIEL MOSES

Plaintiff,

No. 95 C 199 *v.*

CITY OF EVANSTON,

Defendant.

OPINION AND ORDER

CHARLES R. NORGLE, SR., District Judge:

Before the court are the parties' cross-motions for summary judgment. For the following reasons, Defendant City of Evanston's motion is granted and Plaintiff Daniel Moses' motion is denied.

I. Background

At the time of filing, Moses was a commander in the Evanston Police Department. Moses filed this action, complaining that he was suspended without due process under the Fourteenth Amendment. The alleged due process violation arose out of an incident in which Moses was accused of "body slamming" a youth against a police car. At a staff meeting, Moses stated that he had thrown a youth against the car. The youth filed a citizen's complaint with the department against Moses, alleging that Moses acted improperly.

In the course of investigating the complaint, Defendant's police investigators heard and tape-recorded statements from six witnesses, including the police officer present with Moses at the incident, and the complainant. The Acting Chief of Police wrote a memorandum stating that he had overheard Moses boasting that Moses had "body slammed" a youth.

In disciplining Moses, Defendant followed the procedures set forth in its Personnel Manual. Under Defendant's civil service rules, the position of commander is exempt from some of the civil service protections accorded to lower-ranking officers (e.g., lower-ranking officers may appeal administrative decisions).

However, the manual does provide both "due cause" meetings and "pre-disciplinary" hearings to officers at the rank of commander, like Moses, who are suspected of rule-violations. A "due cause" meeting involves consideration of the internal investigation and a recommendation of the maximum level of disciplinary action to be imposed after the pre-disciplinary hearing. The commander is not present at this meeting.

A "pre-disciplinary" hearing provides the commander with an opportunity to respond to the charges, with counsel, and to call witnesses. At a "pre-disciplinary" hearing, the commander is not entitled to review witness statements or other evidence.

In the instant case, Defendant provided Moses with a notice of the investigation which identified the complaint, the time, place, date of the complained for incident, and a summary of the complaint's allegations. After this notice, Defendant conducted a formal interview of Moses, at which Moses elected not to have his counsel present. Defendant did not provide Moses with the statements or the investigation file before Moses' "pre-disciplinary" hearing. Moses also contends that, before the "pre-disciplinary" hearing, Defendant's Acting Chief informed the Evanston City Council of his opinion that Moses should be disciplined. Moses further avers that, also before the hearing, Defendant informed the complainant that his complaint against Moses would be sustained.

Later, at Moses' "pre-disciplinary" hearing, Defendant refused to provide to Moses with the earlier-taken witness

statements. Following the hearing, upon the decision of the Chief of Police, Defendant suspended Moses for thirty days without pay. Unlike officers below the rank of commander, officers, like Moses, above that rank may not appeal their suspensions to the Civil Service Commission.

Moses argues that he was denied a full evidentiary hearing, like that provided to lower-ranking officers, and that this denial deprived him of due process under the Fourteenth Amendment. Moses also contends that his decision-makers were biased, in that they relied on the Acting Chief's memorandum to file and recommendation to the City Council.

Defendant asserts that this court does not have jurisdiction over Moses' claim because Moses has attempted improperly to sue Defendant under the Fourteenth Amendment. Further, Defendant argues, although Moses was not accorded the same procedural safeguards afforded to lower-ranking officers, the safeguards that Defendant did provide satisfied the requirements of the fourteenth Amendment.

II. Discussion

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Transportation Communication Int'l Union v. CSX Transp., Inc.*, 30 F.3d 903, 904 (7th Cir. 1994). To withstand summary judgment, disputed facts in a case must be those that might affect the outcome of the suit. *Tolle v. Carrol Tough, Inc.*, No. 93 C. 287, 1995 WL 572914, at *2 (7th Cir. Sept. 19, 1995).

In the instant case, the court finds that there are no genuine issues as to any material facts. Only legal issues

remain. Accordingly, summary jdugment must be granted here.

Defendant first questions the jurisdiction of the court. Moses' complaint and motion mention only the Fourteenth Amendment as the legal basis for Moses' claim. While misciting and stretching the holdings of various cases, Defendant nevertheless argues correctly that it cannot be sued directly under the Fourteenth Amendment. The Fourteenth Amendment does not provide such a remedy. The Court does not need to imply a cause of action directly under the Fourteenth Amendment where Congress has provided for vindication of those rights through 42 U.S.C. § 1983. *Baxter by Baxter v. Vigo County School Corp.*, 26 F.3d 728, 733 n.3 (7th Cir. 1994). Thus, Moses has not named legally sufficient grounds for recovery.

Even assuming that Moses properly asserted a §1983 violation, Moses has not demonstrated that Evanston deprived him of the due process guaranteed him by the Fourteenth Amendment. Section 1983 claims require a two-step analysis: (1) the court must determine whether the plaintiff was deprived of a protected interest and, if so, (2) whether the process provided to the plaintiff was constitutionally sufficient. *Wallace v. Tilley,* 41 F.3d 296, 299 (7th Cir. 1994).

The court will first address the issue of whether Moses had a protected interest. Moses asserts that he had a protected property interest in his job that Defendant deprived him of that interest. To determine whether a property interest was truly at stake, the court must look to state law. *Farmer v. Lane,* 864 F.2d 473 (7th Cir. 1988). Where municipalities are concerned, property interacts arise from existing municipal rules or understandings. *Panozzo v. Rhoads,* 905 F.2d 135, 138 n.4 (7th Cir. 1990).

The facts of the instant case surrounding the property interest argument are closely analogous to those in *Panozzo.*

In *Pannozo,* the Seventh Circuit Court Appeals indicated that a police officer held a protected property interest in his job where his employer-municipality's personnel policy granted him a right to notice of disciplinary action. Id. at 138 n.4 (citing *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 538 (1985)). Here, Defendant admits that its own Personnel Manual provides for a due cause meeting and a pre-disciplinary hearing before the imposition of discipline on a commander. Accordingly, these provisions create a protected property interest in Moses' job.

The next question is whether Defendant accorded Moses adequate due process in depriving Moses of his protected property interest. When a public employee holds a property interest in a job, the Fourteenth Amendment's Due Process Clause requires notice and an opportunity to be heard before the employee is deprived of that interest. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 542 (1985). Thus Defendant was required to give Moses notice of the charges and a hearing.

The procedural requisites for that notice and opportunity to be heard are flexible. *Id.* at 545. In determining whether Defendant provided sufficient due process, the court must balance the importance of the protected property interest at stake, the significance the government's interest, and the value of the procedures employed in light of those completing interests. *Swanson v. Village of Lake in the Hills,* 962 F.2d 602, 604 (7th Cir. 1992). Generally, something less than a full evidentiary hearing prior to administrative action is adequate under due process standards. *Loudermill,* 470 U.S. at 545.

Moses received both notice of the complaint against him and an opportunity to heard. First, Moses received a letter notifying him of the official investigation, the time and place of the complained of conduct, and the specific rules Moses was charged with violating. Second, more than two months

after he received notice of the complaint against him, Moses participated in the pre-disciplinary hearing where he had counsel and explained his version of the event himself and through witnesses.

Moses complains that, at this hearing, Moses was not allowed to cross-examine regating the statements of the witnesses to whom Defendant's investigating officers had spoken, nor was he given copies of their statements. In addition, Moses was not given a copy of the memo by the Acting Chief, apparently written before the investigation commenced, which indicated that Moses had boasted about the complained of incident.

Nevertheless, Moses received the requisite notice and opportunity to heard. *See, e.g., Panozzo v Rhoads,* 905 F.2d 135 (7th Cir. 1990) (police officer was not denied due process where he was given only one night's notice of pre-termination hearing, was granted only a one hour continuance to secure counsel for that hearing, and where he was denied post-termination appeal for failure to meet timeliness and specificity requirements). The Sixty Amendment right to confront accusers does not apply in the context of administrative suspensions. *Perez v. U.S.,* 850 F. Supp. 1354, 1364, on recons. No. 93 C 2151, 1994 WL 662527 (N.D. Ill. Nov. 17, 1994) (addressing other issues). The hearing need only be sufficiently structured to permit the plaintiff an opportunity to be heard on the charges; it need not accord the plaintiff the same rights granted to criminal defendants. Id. The court finds that the hearing in the instant case was constitutionally adequate.

Still, because Defendant allows other, lower-ranking, officers more due process (i.e., the opportunity to appeal disciplinary decisions), Moses here asserts that Defendant deprived Moses of his minimum level of due process. However, under the due process analysis, the relevant inquiry is not whether Moses received the same procedural protections

as everyone else; rather, the issue is whether Moses received the minimum procedural protections guaranteed to him by the Fourteenth Amendment. *See Swanson,* 957 F.2d at 604-05. Because Defendant accorded Moses sufficient notice and an opportunity to be heard, Defendant satisfied minimum due process requirements before suspending Moses.

Still, citing *Ward v. City of Monroeville,* 409 U.S. 57 (1972), Moses blankly states that he was denied a right to an impartial decision-maker. In *Ward,* a mayor imposed traffic fines on citizens where that mayor was responsible for city revenue, a substantial portion of which arose through traffic fines. *Ward,* 409 U.S. at 59. The Seventh Circuit has recognized that, short of allegations of financial conflicts of interest, courts must acord a "'presumption of honesty and integrity' to administrative decisionmakers." *Swanson,* 962 F.2d at 605 (quoting *Withrow v. Larkin,* 421 U.S. 35, 47 (1975)); *Panozzo,* 905 F.2d at 140. Here, there are no allegations of financial interest or other motives that could sway a decision-maker. Therefore, Defendant's disciplinary officials are presumed impartial.

Moses argues that hs pre-disciplinary hearing was inadequate under due process standards because the decision was made prior to the hearing by a biased decision-maker. However, due process does not require that employees be given opportunity to be heard prior to suspension. See *Wallace,* 41 F.3d at 301 (post-termination hearing met due process requirements). Defendant was required to provide notice and an opportunity to be heard at some point. Moses' pre-disciplinary hearing was not a due process sham and Moses was accorded the requisite rights at a constitutionally adequate hearing.

III. Conclusion

In conclusion, Defendant did accord Moses the necessary procedural protections prior to his suspension. Defendant's motion is granted. Moses' motion is denied.

IT IS SO ORDERED.

DATED: October 19, 1995

ENTER:

/s/ Charles Ronald Norgle, Sr.
United States District Judge